Office Supreme Court, U.S.
FILED
DEC 10 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 527

COMPANIA ANONIMA VENEZOLANA
DE NAVEGACION (VENEZUELAN LINE),
Petitioner-Libelant Appellant Below

versus

A. J. PEREZ EXPORT COMPANY, ETC., and
TYLER REFRIGERATION CORPORATION,
Respondents-Appellees Below

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

JAMES J. MORRISON
1007 National Bank of Commerce Building
New Orleans 12, Louisiana
Proctor for Petitioner

American Printing Co., Ltd., 424 Camp Street

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 527

COMPANIA ANONIMA VENEZOLANA
DE NAVEGACION (VENEZUELAN LINE),
Petitioner-Libelant Appellant Below

versus

A. J. PEREZ EXPORT COMPANY, ETC., and
TYLER REFRIGERATION CORPORATION,
Respondents-Appellees Below

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

Respondents have filed a brief in opposition to the petition for a writ of certiorari herein, and except for petitioner's own lack of precision in its Petition this supplemental memorandum may not have been necessary.

I. SUBROGATION AND CHOICE OF LAW

Petitioner was unprecise in references to Venezuelan Line and Isbrandtsen, their relationship, and the nature of the payment giving rise to the subrogation in question, in its Petition for Certiorari. Venezuelan Line is a corporate agency of the Venezuelan Government, domiciled in Venezuela. In its Answer to Interrogatories,[1] Venezuelan Line states:

> "1. We, Venezuelan Line, were represented by Isbrandtsen, (New Orleans) Inc., a Louisiana Corporation with its principal office and place of business located at Sandlin Building, 442 Canal Street, New Orleans, Louisiana.
>
> 4B. There was in effect between ourselves and Isbrandtsen, (New Orleans) Inc., the following provision of Isbrandtsen's agency contract . . . relative to the handling of the bills of lading sued on herein:
>
> > '. . . all due bills that Isbrandtsen may issue for freight , . . will be the exclusive responsibility of Isbrandtsen.'
>
> 6. . . . an amount equaling the total freight charges was received by us from Isbrandtsen, (New Orleans) Inc., pursuant to the indemnity agreement above referred to . . ."

Petitioner, in its Petition for Certiorari, has insisted that the above agency agreement between Isbrandtsen, (New Orleans) Inc. and Venezuelan Line was a Louisiana Contract, and that the incidents of payment pursuant to

[1] See Record, pp. 27-30.

the indemnity agreement therein contained (including subrogation) was governed exclusively by Louisiana Law.[2] Respondent has accused petitioner of "misreading the Agency Agreement upon which it seeks to rely," and, pointing out that it was "to be performed in the Gulf Ports, Baltimore and Philadelphia" asks "how can petitioner say that Louisiana law is any more applicable . . . than Texas law, or Maryland law, or the commonwealth of Pennsylvania!"[3]

The answer is obvious, and shows only how completely mixed up over choice of law both respondent, and the lower court, have been in this case. It must be obvious that *all* of the above laws, plus maritime law and English Equity, conflicting as they do, cannot possibly be applicable at once!! And it must further be obvious that the only possible choices really lie between Louisiana Law on the one hand, and the Law of Venezuela, the other contracting party's domicile, about which everyone has apparently forgotten! But fortunately, the solution is completely clear, and dictated both by the Louisiana Civil Code and even the common law of Conflicts of Laws, though the latter is inapplicable.

In Louisiana, an agency agreement is a contract of mandate,[4] which is complete "only by the acceptance of the mandatary."[5] Article 10 of the Louisiana Civil Code expressly provides:

---

[2]See Petition, pp. 22-27.
[3]See Respondent's Brief, p. 4.
[4]Louisiana Civil Code, Article 2985.
[5]Id., Article 2988.

> "The form and effect of . . . private written instruments are governed by the laws and usages of the places were they are passed or executed.
>
> But the effects of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect."

The Louisiana Courts have held:[6]

> "... these contracts were Louisiana contracts, because the last steps in the completion thereof were to be performed in Louisiana."

As the "last step" to the completion of the Isbrandtsen, (New Orleans) Inc. Agency Agreement was the "acceptance of the mandatary" at its legal domicile in New Orleans—where the contract of mandate was "to have effect" despite incidental duties thereunder elsewhere — it is clear that pursuant to Article 10 of the Louisiana Civil Code the agency agreement or contract of mandate was "passed or executed" at New Orleans, and created under, effective pursuant to, and governed by, the Law of Louisiana, where every act involved in this case was done and performed, and which additionally is the *lex fori*. Even *Corpus Juris Segundum* agrees, saying:[7]

> "The cases abound in the statements to the effect that, as a general rule, the law of the place where a contract is made or entered into governs with respect to its nature, validity, obligation and in-

---

[6] *Caldwell & Co. v. Deschanel International Corp.*, 6 La. App. 802.

[7] 15 C.J.S., pp. 883-885, *Verbo* "Conflict of Laws," Sec. 11(b). See also RESTATEMENT, *Conflict of Laws*, Sec. 332; 312-331; *Goodrich*, CONFLICT OF LAWS (2d ed.) 274-5.

terpretation. This has been said to be the rule even though the place where the contract was made is different from the place where it is to be performed, and particularly so if the place of making and the place of performance are the same. . . .

The American Law Institute has adopted the rule that the law of the place of contracting determined the validity and effect of a contract. . . .

The question of what is the place of making of a contract . . . is, broadly stated, the place where the final act occurs which makes the transaction a binding contract."

The Restatement expressly sanctions Article 10 of the Louisiana Civil Code, providing:[8]

"The law of the forum decides as a preliminary question by the law of which state questions arising concerning the formation of a contract are to be determined . . ."

Thus as certainly as the non-maritime contract of agency between Isbrandtsen (New Orleans) Inc. and Venezuelan Line cannot be governed by maritime law,[9] it can only be governed by Louisiana law; and the court below was in grievous error in governing it by English Equity.

II. LOUISIANA "EQUITY" BEARS NO RELATION TO "ENGLISH EQUITY", WHICH IS CONSTITUTIONALLY BARRED FROM LOUISIANA

Respondent even attempts to convince this Court that the English Chancellor's Equity applied in this case to

[8] RESTATEMENT, *Conflict of Laws*, Sec. 311.
[9] See Authorities cited Petition, pp. 23-24.

thwart and defeat the Louisiana law of automatic subrogation is the same as the "equity" authorized by Article 21 of the Louisiana Civil Code.[10] But nothing can be further from the truth. English Equity is anathema to Louisiana Civil Law, and is excluded from the State of Louisiana by no less authority than the Louisiana Constitution itself!![11]

Even the redactors of the very first versions of Article 21 were careful to differentiate the "equity" there referred to as a formula for expressing in terms of 18th Century idealistic lego-philosophy the juridical method of the Civilian Law, and rejected flatly any implication that the use of the term authorized a judge to set "equity" in opposition to "law," as the Fifth Circuit Court has done in this case.[12] Thus, Portalis, one of the Redactors of the French Projects for a Civil Code — the source of Article 21, said:

> "Thus in Rome the praetor did not apply the law when he believed it contrary to natural equity. He introduced the actions of 'good faith' in order to escape the laws which had established exact formulae for each action; in England, the court of equity . . . often made decrees (reglemens) in order to change the laws (los lois): *but this is not how this article works.* Our article only fits the cases where the law is obscure or insufficient and the cases where there is even no law. In these several instances should the judge surrender his calling or fulfill it? (Emphasis added).

This legal principle continues to exist so strongly in

---

[10]See Respondent's Brief, pp. 5-8.

[11]LOUISIANA CONSTITUTION OF 1921, Art. 3, Sec. 18.

[12]For a full discussion of the subject, including the following quote, see Franklin, *Equity in Louisiana, The Role of Article 21*, 9 Tulane L. Rev. 485.

Louisiana that the Louisiana Supreme Court has said:[13]

> "If, when the state was admitted into the Union, the inhabitants had preferred the systems of common law and equity which had been adopted by the other states, they, too, would, no doubt, have adopted them. But, instead of so doing, they incorporated in the first state Constitution (adopted in 1812) the provision and prohibition (article 4):
>
> > " 'Sec. 77. . . . the Legislature *shall never adopt any system* or code *of laws by a general reference to the said system* or Code, but in all cases shall specify the several provisions of the laws it may enact. (Emphasis added).
>
> "What the Legislature did (after some years) with reference to equity was, not to adopt the system as it then existed elsewhere (whether it was capable of overriding the law, according to the conscience of the chancellor and the exigencies of the particular case, or according to fixed principles applicable to all cases alike), but to declare that:
>
> > " 'In civil matters, where there is no express law, the judge is bound to proceed * * * according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, *where positive law is silent.*' Civ. Code, art. 21.
>
> "Since 1812 there have been seven Constitutions adopted in Louisaina, exclusive of that with which she became a state, and inclusive of one which is not yet two years old, and *each has contained the*

[13] *LeBlanc v. City of New Orleans*, 138 La. 243, 70 So. 212.

> *same original prohibition against the adoption of 'any system of laws' especially directed, as is well known historically, against the . . . 'equity' systems established in the other states.* The ordinary measure of the jurisdiction of our courts, sitting in equity (if such an expression can be used), has therefore never been, and is not now, the measure by which the jurisdiction of chancery courts in general is determined, but has been, and is, and must be, neither greater nor less than as fixed in the written grant whereby it has been, and is now, conferred; and the precedents established by chancellors who are administering a system thus prohibited in this state, not of law, but of jurisprudence, which still prevails against the law, . . . must, in the nature of things, be considered with respectful caution by courts which administer written law, and can appeal to equity (defined to be 'natural law and reason or received usages') *only when the written law is silent.* (Emphasis added).

Hence it is shocking to find, thanks to the decision of Fifth Circuit Court of Appeals in this case, an English Chancellor lurking under every word of a strictly non-maritime Louisiana contract entitled to be governed, interpreted, and applied, according to Louisiana law, fully armed with a magic wand ready to wave it at the whimsey of a Federal judge "capable of overriding the law, according to the conscience of the chancellor and the exigencies of the particular case," in flat defiance of the Louisiana law, the Louisiana Constitution, and of the Supreme Court of the State of Louisiana!!

That such invasion of the Federal judiciary of the sovereignty of the State of Louisiana, and such brushing

aside of state law, is both unconstitutional and contrary to the policy of this Honorable Court is fully demonstrated in our original petition for certiorari,[14] and cries out for review and rectification. To heap the English Chancellor and his veto of law on top of Louisiana Civil Law in express violation of Louisiana's Constitutional prohibition against him and his magic wand capable of making Louisiana law disappear, truly reduces Louisiana to second-class citizenship in a Union of supposedly equal sovereign states!

Respondent, in its Brief at p. 7, apparently admitting that the decision below on this ground is insupportable, suggests an alternate decision:

> "that the agent may seek and obtain subrogation, but, then, must return that which its improper conduct caused these respondent-shippers to lose. . ."

That is an issue we would be glad to meet, but respondents have neither pleaded nor proved that they lost one dime by any "improper conduct" of Isbrandtsen (New Orleans) Inc. or Venezuelan Line — but only by the embezzlement of their own agent of their own funds they alone entrusted to him. Having the Chancellor's "grace," respondents are relieved from all proof of loss, fault, or proximate cause, it would otherwise be their burden to bear under the law of Louisiana!!!

III. PLEA OF PAYMENT

It will be observed that Respondents, in their brief,[15] have reurged the plea of payment,[15] and reprint the Trial

---

[14]See pp. 23-24, 30.
[15]Brief pp. 2-3, 7.

Court's Findings and Conclusions as an Appendix in support thereof. Suffice it to say that this is so far-fetched that even the Court of Appeals could not go along, observing:

> "Our differences (with the District Court Judge), such as they are, concern the legal significance of facts."

IV. COLLUSION DEFEATING POLICY OF UNITED STATES SHIPPING ACT ADMITTED BY RESPONDENTS

One would think that Respondent's way of stating the case on page 3 of its Brief admits that the decision of this case in its favor violates every principle and policy of the Shipping Act. The whole purpose of that Act is to prohibit collusion between carriers and their agents on the one hand, and shippers and their agents on the other hand. Yet respondents admit:

> ". . . since the respondent-shippers have paid the same amount to the freight forwarder with whom the carrier's agent colluded, there has been neither a "failure of the carrier to collect" nor a "favoring of shippers."

But is not the very purpose of the Shipping Act to prevent such "collusion," and to keep both carriers and their agents (who even the District Court characterized as "*alter-ego*")[16] off what respondent aptly characterizes as a " 'collusion course' to curry favor of the forwarder (i.e. the shipper's agent), and thus advance its own selfish

[16]See District Court Conclusions of Law II, Respondents' Brief p. 17.

business interests"?[17] How else can a carrier, through its agent, maintain a "collusion course" with a shipper or his forwarding agent except by rebating freights and thus favoring shippers and/or their forwarding agents contrary to the Shipping Act? And is the Shipping Act any the less violated because the rebate is received by the shipper's forwarding agent rather than by the shipper itself? Indeed, is not the pressure to rebate freights heavier in favor of the forwarder than the isolated shipper, whose economic power is such that the Fifth Circuit Court described it as follows:[18]

> The Agent did not really try very hard, nor, by the nature of things, could he either press too strongly for payment by the Freight Forwarder, or take the extraordinary step of notifying the Shipper that the Freight Forwarder had defaulted on his trust. This was because competitive forces in the shipping business are so severe in the solicitation and booking of outbound export traffice, that the Agent, dependent upon its generated traffic for its compensation (see Note 6, supra) did not wish to incur the ill will of the Freight Forwarder as a source of added business from other shippers in the future. And where excessive pressure on the Freight Forwarder to pay its obligations might be thought untactful, it was completely out of the question, so the Agent made clear, for it to embarrass this potential source of future business by exposing his infidelity, incompetence, or down right dishonesty to the principal (the Shipper). To collect the freight from the Freight Forwarder was important. But one cannot read this record without the uncomfortable

[17] Respondent's Brief, p. 7.
[18] See Petition, Appendix A, p. 45-46.

conviction that what was more important was preserving the good will of the Feight Forwarder lest traffic suffer tomorrow."

Is not the whole regulatory scheme of things envisioned by the Shipping Act threatened and upset by such pressures resulting in rebates which not only represents violations of law in failing to collect full freights, but unfair competition to competing carriers, and opens the door to ruinous rate reductions among carriers to induce shippers to leave forwarders who put the illegal rebates in their own pockets, as did Alonzo here, and obtain the benefit of lower freights themselves? Indeed, does this not open the whole Pandora's Box of rebate, rate reduction, unfair competition, interruption or reduction of service, and ultimate crippling of the American Merchant Marine sought to be guarded against by the Shipping Act, whether the freights are not collected from shipper or forwarder by carrier or agent, willy-nilly or in any combination?

And still, respondent fails to explain why, in this case alone, the shipper is excused from his own law violation, and is permitted to have his cargo carried free without prepayment of freights — but simply upon advancing same to his own freight forwarder — contrary to bill of lading provisions, in violation of tariffs filed with the Federal Maritime Board, and contrary to the provisions and policy of the Shipping Act, regardless of any "collusion" with the carrier or his agent. Even respondent admits that petitioner relies on correct "Carrier Law"; and to argue that "respondents have paid them (the freights)" is as purile as to argue that "the carrier has collected its freights" (Brief p. 3) in the face of the undisputed record that re-

spondents only *advanced* the freights to its own forwarding agent, who embezzled them, and the carrier collected, not the freights, but a contractual indemnity from its agent. Such a holding violates every principle of Carrier Law!

V. CONCLUSION

It is therefore respectfully suggested that the complained of decision of the court below should be reviewed by this Honorable Court and reversed for the reasons set forth here, as well as in the original Petition for a Writ of Certiorari.

Respectfully submitted,

JAMES J. MORRISON
1007 National Bank of Commerce Building
New Orleans 12, Louisiana
Proctor for Petitioner, Venezuelan Line

PROOF OF SERVICE

I, James J. Morrison, Proctor for Compania Anonima Venezolana De Navegacion (Venezuelan Line), petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33, 3(b), that on the 6th day of December, 1962, I served copies of the foregoing Supplemental Memorandum in Support of Petition for Certiorari to the United States Supreme Court on Tyler Refrigeration Corporation and A. J. Perez Export Company, respondents, by mailing a copy in

a duly addressed envelope, first class postage prepaid, to Messrs. Kierr and Gainsburgh, 1740 National Bank of Commerce Building, New Orleans 12, Louisiana, their counsel of record.

JAMES J. MORRISION